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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. 94-1521

JESSIE L. SPENCER,
Petitioner,

vs.

MRS. BAIRD'S BAKERIES, INC. and
INTERNATIONAL BROTHERHOOD
OF THE TEAMSTERS UNION LOCAL NO. 988,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR MRS. BAIRD'S BAKERIES, INC. IN OPPOSITION

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II.
LIST OF AFFILIATED COMPANIES

Mrs. Baird's Bakeries, Inc. has no affiliated companies.

III.
TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

A. Background Facts 2

B. Proceedings In The Courts Below 4

THE REASONS THE PETITION SHOULD BE DENIED 6

A. The questions presented in support of the Petition for Writ of Certiorari were not raised by the Petitioner in any of the proceedings in the lower courts. 6

B. The questions presented for review are not sufficient reasons under Supreme Court Rule 10 for granting a writ of certiorari. 10

CONCLUSION 12

PROOF OF SERVICE 13

IV.
TABLE OF AUTHORITIES

I. Cases

E.E.O.C. v. Federal Labor Relations Authority,
476 U.S. 25, 106 S.Ct. 1678 (1986) 6

Demarest v. Manspeaker,
498 U.S. 184, 111 S.Ct. 599 (1991) 6

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189, 109 S.Ct. 998 (1989) 6

Texas Division-Tranter, Inc. v. Carrozza,
876 S.W.2d 312 (Tex. 1994) 10

U.S. v. Alvarez-Sanchez,
114 S.Ct. 1599 (1994) 6

II. Rules, Regulations and Statutes

5th Cir. R. 47.5 1

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1981 4

Texas Labor Code § 451.001 7

TEX. REV. CIV. STAT. ANN. art. 5221k § 7.01(a) 4

Title VII of the Civil Rights Act of 1964 4

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OPINIONS BELOW

Pursuant to Local Rule 47.5, the Court of Appeals for the Fifth Circuit determined that its opinion affirming the district court should not be published. 5th CIR. R. 47.5. The content of the Fifth Circuit's

unpublished opinion, however, is reprinted in Appendix A of Petitioner's Petition for Writ of Certiorari. [Pet. App. at 1a-4a][1]

Likewise, the district court did not publish its memorandum order granting Respondents' motions for summary judgment. The district court's memorandum order is reprinted in Appendix B of Petitioner's Petition for Writ of Certiorari. [Pet. App. 5a-21a]

JURISDICTION

Petitioner invokes the jurisdiction of the Court pursuant to 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

A. ***Background Facts.***

This case arose out of the termination of the Petitioner's employment by Respondent Mrs. Baird's Bakeries, Inc. ("Mrs. Baird's") in October of 1990. While he was employed by Mrs. Baird's, the Petitioner

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1/ Citations to Petitioner's Petition for Writ of Certiorari are referred to as "Pet.," followed by the page number. Citations to the appendix included with the Petition for Writ of Certiorari are referred to as "Pet. App.," followed by page number.

was injured in November of 1989 and required surgery. [Pet. App. 6a.] At the time, Mrs. Baird's had a policy that it may terminate an employee who has been off work for six months or more due to illness or injury. After Petitioner had been absent from work for over six months, Mrs. Baird's sent him a letter asking about the status of his health. [*Id.*] Mrs. Baird's policy requires that the employee respond to this inquiry within 30 days and provide a date when the employee will return to full-time work. [Pet. App. 7a.]

The Petitioner never responded to this letter. [*Id.*] After sending another letter to Petitioner in July of 1990, Mrs. Baird's finally received responses from both the Petitioner and his physician. [*Id.*] Both letters stated that it was possible that the Petitioner would not ever be able to return to work. [Pet. App. 7a-8a.] After several months passed, Mrs. Baird's met with the Petitioner in October 1990 and terminated his employment based on the information provided by the Petitioner and his physician and because he had been absent from work for almost one year. [Pet. App. 8a.]

The Petitioner protested his termination and requested that Mrs. Baird's contact his physician again. [*Id.*] Mrs. Baird's contacted the physician and received another letter which stated that the physician was unable to provide an estimated date when the plaintiff would be able to perform the duties of his job. [*Id.*] As a result, Mrs. Baird's did not change its decision. [*Id.*]

B. ***Proceedings In The Courts Below.***

The Petitioner's original complaint filed in the district court alleged breach of the duty of fair representation against the Union based on the Union's actions regarding the Petitioner's grievance protesting his termination. [Pet. App. 10a-11a.] He also alleged that his termination was a breach of the collective bargaining agreement by Mrs. Baird's and was racial discrimination by Mrs. Baird's based on 42 U.S.C. § 1981, Title VII of the Civil Rights Act of 1964, and Tex. Rev. Civ. Stat. Ann. art. 5221k § 7.01(a) (Vernon 1990). [*Id.*]

The Petitioner's original complaint did not allege any claims under the Texas Workers' Compensation

Act or the Texas Code of Professional Responsibility, which the Petitioner now presents as the sole questions for review in his Petition for Writ of Certiorari.

Respondents, International Brotherhood of the Teamsters Union Local No. 988 and Mrs. Baird's, both filed motions for summary judgment in the district court on all claims. [Pet. App. 5a.] On May 18, 1993, the United States District Court for the Southern District of Texas granted the Respondents' Motions for Summary Judgment on all claims. [Pet. App. 5a-21a.]

On June 15, 1993, Petitioner filed a Motion for Relief from the Summary Judgment Order under Federal Rule of Civil Procedure 60(b). [R. 1029] The District Court denied the Petitioner's Motion on June 30, 1993. [R. 1037]

On November 15, 1993, Petitioner filed an appeal to the Fifth Circuit from the District Court's denial of the Rule 60(b) Motion. [R. 1044] On July 20, 1994, the Fifth Circuit affirmed the judgment of the District Court and stated that, "Spencer fails to show that the district court's denial of his Rule 60(b) motion was so

unwarranted as to constitute an abuse of discretion." [Pet. App. at 4a]–

THE REASONS THE PETITION SHOULD BE DENIED

A. *The questions presented in support of the Petition for Writ of Certiorari were not raised by the Petitioner in any of the proceedings in the lower courts.*

Issues not raised by the Petitioner in either the Court of Appeals or the District Court cannot be the basis of review by the United States Supreme Court. The United States Supreme Court generally refrains from addressing issues not raised in the lower courts by the Petitioner. *E.E.O.C. v. Federal Labor Relations Authority*, 476 U.S. 25, 106 S.Ct. 1678, 1681 (1986) (Court dismissed writ of certiorari); *see also U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1605 n. 5 (1994); *Demarest v. Manspeaker*, 498 U.S. 184, 111 S.Ct. 599, 603 (1991); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 1003 n. 2 (1989).

The Petitioner states two questions for review by the Court:

1. Is discrimination against and [sic] employee prohibited, and a person may not discharge or in any other manner discriminate against an employee because the employee has filed a workers' compensation claim in good faith, and was terminated from employment while under the doctor's care, drawing workers' compensation in violation of 451.001 discrimination against employees prohibited?

2. Does a lawyer violate Texas code of professional responsibility of the Texas disciplinary rule of professional conduct, code printed version's Texas codes annotated volume 3 of the government code title 2 subtitled G appendix article X section 9 when she is allowed to file a case in the United States District Court and not licensed to do so at the time?

[Pet. at i.] Petitioner's questions relate to a claim under Texas Labor Code § 451.001 and a complaint regarding

the professional conduct of the attorney who represented the Petitioner in District Court. Neither of these claims was ever raised by the Petitioner in any of the lower court proceedings prior to the Petition for a Writ of Certiorari.

The Petitioner's Original Complaint alleged a claim against the Union for breach of the duty of fair representation and claims against Mrs. Baird's for breach of a collective bargaining agreement and racial discrimination. The District Court granted the Respondents' Motions for Summary Judgment on all of these claims. Neither a workers' compensation claim nor a complaint regarding Petitioner's attorney's conduct were ever presented to or decided by the District Court.

The Petitioner did not appeal the Court's grant of the Respondents' Motions for Summary Judgment. Instead, the Petitioner filed a Rule 60(b) Motion with the District Court, which the District Court denied. Again, the questions presented by the Petitioner in his

Petition for Writ of Certiorari were neither presented or decided by the District Court.

The Petitioner then appealed the District Court's denial of the Motion for Reconsideration under Rule 60(b). The Court of Appeals affirmed the District Court's decision. Thus, the U.S. Court of Appeals for the Fifth Circuit only reviewed the District Court's decision denying the Rule 60(b) Motion and did not even address any issues regarding the Petitioner's termination of employment by Mrs. Baird's.

Therefore, neither the District Court nor the Court of Appeals addressed or reviewed any issues regarding workers' compensation discrimination or the Texas Rules of Professional Responsibility. Nevertheless, for the first time, the Petitioner asks the U.S. Supreme Court to decide whether his termination violated the antidiscrimination clause in the Texas Workers' Compensation Act.[2] In addition, for the first

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2 Specifically, Petitioner claims that Mrs. Baird's policy of terminating employees on workers' compensation for longer than six months violates

(footnote continued on next page)

time, the Petitioner claims that the attorney that represented him in District Court violated a rule of professional conduct because she was not licensed to practice before the District Court at the time she filed the Complaint. There is no record of these issues in the lower courts, and these issues were never litigated in the District Court or Court of Appeals. Therefore, the Court should deny the Petition for Writ of Certiorari.

B. ***The questions presented for review do not ratify the criteria under Supreme Court Rule 10 for granting a writ of certiorari.***

Rule 10 of the Supreme Court Rules lists several grounds on which the Court will consider review on Writ of Certiorari. The questions presented by the Petitioner do not come within any provision of Rule 10.

(footnote continued from previous page)

> the anti-discrimination provision of the Texas Workers' Compensation Act. [Pet. at 8]. Petitioner is incorrect for two reasons. First, Petitioner misstates Mrs. Baird's policy. The policy provides that any employees absent more than six months because of injury or illness may be terminated. [Pet. App. 69]. Second, the Texas Supreme Court has held that, "uniform enforcement of a reasonable absence-control provision . . . does not constitute retaliatory discharge." *Texas Division-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 313 (Tex. 1994).

Generally, the three reasons listed in Rule 10 are:

1. A United States Court of Appeals' decision in conflict with a decision in another United States Court of Appeals on the same matter;
2. A state court of last resort decision on a federal question in conflict with a decision of another state court of last resort or a United States Court of Appeals;
3. A state court or United States Court of Appeals' decision on an important question of federal law which has not been, but should be, settled by this Court, or conflicts with applicable decisions of this Court.

Rule 10 (.1).

Petitioner's questions presented for review by this Court do not meet any of these criteria. First, as described above, the questions presented for review in Petitioner's Petition for Writ of Certiorari are not questions that were even decided by the Court of Appeals, as required by Rule 10(.1)(a) and (c). Second, the questions presented in the Petition for Writ of

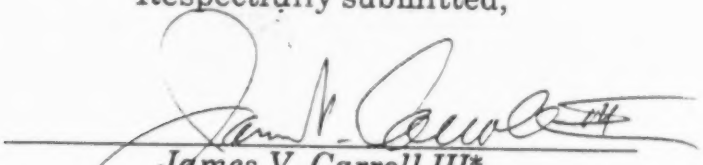
Certiorari are not federal questions as required by Rule 10 (.1)(b) and (c).

Thus, the questions presented in the Petition for Writ of Certiorari are not sufficient under Rule 10 to merit review by the Court.

CONCLUSION

For these reasons, review of this case by the Court is not warranted and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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PROOF OF SERVICE

James V. Carroll III of Andrews & Kurth L.L.P. deposes and states that he served this Brief in Opposition to Writ of Certiorari on the Petitioner by enclosing three copies of each thereof in an envelope, certified mail, return receipt requested, addressed to:

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and by depositing same in the United States mail at Houston, Texas, on the 13th day of April, 1995. James V. Carroll III further deposes and states that all parties required to be served have been served.

James V. Carroll III